No. 82-1418

In The

Supreme Court of the United States

October Term, 1982

CHAPMAN INDUSTRIES CORP.,

Petitioner,

vs.

N.A. SALES COMPANY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in concluding, on the basis of the record before it, that petitioner had received a fair trial and that petitioner's Seventh Amendment jury trial right had been satisfied.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, N.A. Sales Company, Inc., respectfully opposes the Petition for Writ of Certiorari, which seeks a review of the decision and judgment of the United States Court of Appeals for the Second Circuit dated November 22, 1982, which affirmed the decision and judgment of the United States District Court for the Eastern District of New York, dated March 23, 1982 on the following grounds: That the decisions and judgments of the courts below were properly determined in accordance with

applicable decisions of this Court and that there is no significant issue raised by the Petition for a Writ of Certiorari for this Court to decide.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals properly affirmed the District Court decision and judgment which in turn had properly adhered to the jury's findings as same related to questions of law and acted properly and within its discretion in disregarding those findings as same related to questions of equity inasmuch as said latter findings were advisory.

The petition to this Court erroneously pre-supposes that all fact issues presented at the trial below were required to be determined by the jury and that the trial court was bound by the jury verdict on all issues. This has never been the interpretation of the Seventh Amendment by this Court and is in complete contravention of Federal Rule of Civil Procedure 39(c), which permits the trial court to try issues sounding in equity to an advisory jury. Petitioner's reliance therefor on *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959) and its progeny, is misplaced.

This Court has never altered the fundamental tenet that the Seventh Amendment has no application to actions or to issues sounding in equity which are and always have been within the exclusive province of the court to determine. *Beacon Theatres, Inc. v. Westover, supra; Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962); *Sheila's Shine Products, Inc. v. Sheila's Shine, Inc.,* 486 F. 2d 114 (Fifth Cir. 1973); *Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc.,* 574 F. 2d 90 (Second Cir. 1978); *Crane Co. v. American Standard, Inc.,* 490 F. 2d 332 (Second Cir. 1973). In this case the trial court,

absent a demand during trial by either of the litigants to delineate which issues were equitable and which issues were legal, properly submitted all issues to the jury in the first instant, reserving to the trial court the right to rule on all equitable issues.

Inasmuch as the best efforts issue uniquely pertained to petitioner's third and fourth counterclaims, which alleged unfair trade practices and trademark infringement, which have historically been recognized as equitable claims and as to which claims petitioner conceded in its pleading that it had no remedy at law (*see* pages 47-48 of petitioner's appendix), the trial court properly reserved its right to determine the issues. *Sheila's Shine Products, Inc. v. Sheila's Shine, Inc., supra; Crane Co. v. American Standard, Inc., supra; Owens Illinois, Inc. v. Lake Shore Land Co., Inc.*, 610 F. 2d 1185 (Third Cir. 1979). The fact that the third and fourth counterclaims sounded in equity is buttressed further by the fact that petitioner at trial offered not one scintilla of proof that it sustained damages as a result of the alleged practices of respondent.

The trial court's determination that respondent had not breached the agreement by failing to use its best efforts could not be overturned unless said determination was "clearly erroneous." Federal Rules of Civil Procedure, Section 52(a); *Hyde Properties v. McCoy*, 507 F. 2d 301 (Sixth Cir. 1974). The Court of Appeals properly found this not to be the case.

II.

The Court of Appeals properly reviewed the record below and determined that the trial court's determination was correct as a matter of law.

Petitioner suggests that the Court of Appeals' affirmance conflicts with the holding in *Hensley v. E.R. Carpenter Co.*, 633

F. 2d 1106 (Fifth Cir. 1980). Respondent submits that there is no conflict. In the *Hensley* case, the trial court, in violation of the principle enunciated by this Court in *Dairy Queen, supra,* tried and determined the equitable issues in the case, prior to permitting the trial of legal issues, the decision on which equity issues by the court was allowed to preclude the hearing of the legal issues before a jury.

In this case, all issues were tried to the jury, both legal and equitable. The Court of Appeals in reviewing the trial court's determination held upon a review of the record at trial that "Judge Mishler's refusal to find that N.A. Sales did not substantially and materially breach the Agreement was correct as a matter of law." The Court of Appeals therefore determined that based upon the record and applying the appropriate standard to that record, the trial court could have directed judgment N.O.V. against defendant with regard to the issue of Special Verdict 10(a).*

The Court of Appeals therefore determined that it was not required to deal with the issue of whether Special Verdict 10(a) was a legal issue binding upon the trial court or an equitable issue not so binding, because in any event the evidence in the record on the issue of best efforts was so clearly in favor of respondent that the trial court could have, and perhaps should have, granted respondent a judgment N.O.V. thereon. (*See* petitioner's appendix, pages 4-5.) It is submitted that this factual determination by the Court of Appeals should not be further considered by this Court.

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* The Special Verdict of the jury was annexed to the Memorandum of Decision and Order of the trial court and should have been made a part of petitioner's appendix B. Same has therefore been included in an appendix to respondent's brief.

III.

There is no conflict amongst the courts of appeals.

Petitioner's assertion that the determination of the Second Circuit in this case is in conflict with the Sixth Circuit, citing *Hildebrand v. Board of Trustees of Michigan State University,* 607 F. 2d 705 (Sixth Cir. 1979) is strained indeed. It is submitted that the reversal by the Sixth Circuit of the trial court in the *Hildebrand* case, was based on an amalgam of error by the trial court in a decision two years after the trial, in a case which the appellate court understatingly referred to as "tangled and protracted." The facts of said case and the actions of the trial court there, bear no consequential resemblance to the case before this Court.

Unlike the *Hildebrand* trial judge, the trial court here tried all issues to the jury, recognizing this as the fairest method for the litigants to present their respective proofs. While petitioner suggests that the trial court disregarded, in the first instant, the jury verdicts on matters of equity, the record does not reveal this. In fact, Judge Mishler gave consideration to all jury verdicts, both those which were binding upon him and those which were advisory by reason of the nature of the claim, and exercised the time immemorial prerogative of trial courts in finding contrary to an advisory verdict.

Noteworthy, however, is that a reading of Special Verdict 10(a), the treatment of which petitioner takes issue with, together with Special Verdict 11(a), makes clear that the trial court's ruling on the issue of best efforts was totally consistent. That the trial court has inherent right to resolve apparently inconsistent verdicts is well founded. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962). Application of reason and logic makes clear that the jury determined that respondent used its best

efforts in the distribution of the Chapman Kar-Lok which the evidence revealed constituted perhaps ninety (90%) per cent of the product of petitioner sold by respondent, which verdict makes ever so clear that Special Verdict 10(a) referred to an insignificant aspect of the case. The Court of Appeals was correct in so finding.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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DAVID HALPERIN
HOWARD SLOTNICK

APPENDIX

SPECIAL VERDICT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-81-0070

Filed Jan. 6, 1982

N. A. SALES COMPANY, INC.,

Plaintiff,

-against-

CHAPMAN INDUSTRIES CORP.,

Defendant.

1. Did Chapman breach the agreement in any of the following respects:

(a) By selling Chapman products to N.A. Sales' customers and others in the exclusive area of distribution (para. 2 & 3)

Yes ✓ No

(b) By failing to use its best efforts to supply N.A. Sales with Chapman products in the quantity ordered (para. 10)

Yes ✓ No

Appendix

(c) By deliberately and intentionally delaying the shipment of products ordered by N.A. Sales

Yes ✓ No

(d) On March 4, 1981, by increasing the cost of Chapman products within 6 months of the prior increase and without giving N.A. Sales 30 days prior written notice and without documentation justifying the proposed increase

Yes No ✓

[DO NOT answer 2 if *all* the above answers are *No*]

2. The above breaches of contract caused loss and damage to N.A. Sales in the amount of *$125,000.*

3. Was N.A. Sales obligated to pay the following under the agreement of March 23, 1972 or any modification thereof:

(a) Freight charges Yes No ✓

(b) Pallet charges Yes ✓ No

[DO NOT answer 4 and 5 if the answers to both 3(a) and (b) are *No*]

4. The amount of the freight (and/or pallet) charges due to Chapman on January 7, 1981 was *$1,000.*

5. The failure of N.A. Sales to pay the freight and/or pallet charges was deliberate and intentional.

Yes ✓ No

6. Was N.A. Sales indebted to Chapman on January 7, 1981 for merchandise (exclusive of freight and/or pallet) charges, delivered pursuant to invoices which were then past due?

Yes ✓ No

[DO NOT answer 7(a) or (b) if the answer to 6 is *No*]

7. (a) N.A. Sales was indebted to Chapman in the amount of *$10,000.*

(b) Was the failure to pay the sum due a deliberate and intentional breach of the contract?

Yes ✓ No

8. Did Chapman waive all sums due from N.A. Sales prior to the demand for payment in December 1980?

Yes No ✓

9. (a) Did N.A. Sales breach its agreement to supply a sufficient letter of credit on which Chapman drew on December 16, 1980?

Yes No ✓

[DO NOT answer (b) if the answer to 9(a) is *No*]

(b) Did said breach prejudice Chapman?

Yes No

Appendix

10. (a) Did N.A. Sales use its best efforts in the sale and distribution of Chapman products?

Yes No ✓

[DO NOT answer (b) or (c) if the answer to 10(a) is Yes]

(b) Was such breach substantial and material?

Yes ✓ No

(c) As of January 7, 1981 did Chapman waive the breach and/or breaches of N.A. Sales' obligation to use its best efforts?

Yes No ✓

Dated: Uniondale, N.Y.
January 6, 1982.

s/ Rosanne Cohen
Foreman

Appendix

SUPPLEMENTAL SPECIAL VERDICT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

81-0070

Filed Jan. 6, 1982

N. A. SALES COMPANY, INC.,

Plaintiff,

-against-

CHAPMAN INDUSTRIES, CORP.,

Defendant.

11. (a) Did N.A. Sales use its best efforts in the sale and distribution of the Chapman Kar-Lok?

Yes ✓ No

[DO NOT ANSWER (b) OR (c) IF THE ANSWER TO 11(a) IS YES]

(b) Was such a breach substantial and material?

Yes No

(c) As of January 7, 1981 did Chapman waive the breach and/or breaches of N.A. Sales' obligation to use its best

efforts in promoting the sale and distribution of the Chapman Kar-Lok?

Yes No

Dated: Uniondale, N.Y.
January 6, 1982

s/ Rosanne Cohen
Foreman